

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

United States of America,	)	
	)	
Plaintiff,	)	
	)	Case No. CR 15-582 WHO
VS.	)	
	)	
Adam Shafi,	)	
	)	
Defendant.	)	
_____	)	

San Francisco, California

Thursday, February 25, 2016

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

For Plaintiff:

OFFICE OF THE UNITED STATES ATTORNEY  
Northern District of California  
450 Golden Gate Avenue  
San Francisco, California 94102

BY: **JEFFREY L. SHIH**  
**S. WAQAR HASIB**  
**ASSISTANT UNITED STATES ATTORNEYS**

**(APPEARANCES CONTINUED ON FOLLOWING PAGE)**

REPORTED BY: Kelly L. Shainline, CSR No. 13476, RPR  
Court Reporter Pro Tem

**APPEARANCES:** (CONTINUED)

For Defendant:

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BY: **JOSHUA L. DRATEL**  
**ATTORNEY AT LAW**

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BY: **ERIK LEVIN**  
**ATTORNEY AT LAW**

1 Thursday - February 25, 2016

1:40 p.m.

2 **THE CLERK:** Calling criminal matter 15-582, U.S.A.  
3 versus Adam Shafi.

4 Counsel, please come forward and state your appearance.

5 **MR. SHIH:** Good afternoon, Your Honor.

6 Jeff Shih and Waqar Hasib, H-A-S-I-B, for the United  
7 States, Your Honor.

8 **MR. DRATEL:** Good afternoon, Your Honor.

9 Joshua Dratel and Erik Levin for Mr. Shafi, who is coming  
10 out now.

11 **THE COURT:** Good afternoon.

12 **MR. SHIH:** Also, Your Honor, just so the Court knows,  
13 David Nefouse from Alameda County Counsel is also here.

14 **THE COURT:** Mr. Nefouse, good afternoon.

15 Mr. Shafi, good afternoon.

16 All right. So we're here on the motion for  
17 reconsideration. I've read all the papers submitted by the  
18 parties and by the County Sheriff's Office regarding the motion  
19 to reconsider the conditions of confinement of Mr. Shafi.

20 In order to grant a motion for reconsideration, I  
21 essentially have to find that there are new facts or a change  
22 in law in order to -- that I didn't consider when I initially  
23 made my decision on January 14th. I don't see that in the  
24 papers submitted.

25 I'm going to allow argument, Mr. Dratel, in a moment. But

1 I want you to focus on something that is new or something that  
2 my summary, which I'm about to give, has missed.

3 Let me start by saying that I don't fault Mr. Shafi's  
4 counsel in the least for bringing this matter up again. And I  
5 don't need to hear argument about that. My concern, which  
6 Mr. Shafi latched onto, is to avoid or minimize the mental  
7 health impacts of administrative segregation for Mr. Shafi who  
8 is essentially in protective custody until trial which could be  
9 a long time off.

10 I understand that Mr. Shafi was detained without incident  
11 in general population before his charges became public and that  
12 he'd prefer to be in general population, but classification  
13 decisions are left to the Sheriff, not the Court, until they  
14 have some sort of a Constitutional dimension which they don't  
15 in this case, at least at present.

16 I understand the hardship that's created by administrative  
17 segregation, and it can be particularly hard for vulnerable  
18 detainees. But I have no reason to quarrel with the  
19 administration segregation classification decision regarding  
20 Mr. Shafi which is based on the concern for his safety. The  
21 threat to his health and welfare in general population, given  
22 the publicity that this case has received, the statements he's  
23 alleged to have made, and the crimes with which he's charged  
24 seem real and the classification in administrative segregation  
25 is not inappropriate.

1 Mr. Shafi had complained of two incidents prior to the  
2 last hearing. I've now been provided with a subset of the  
3 material seized during the search on December 17. It did  
4 include seizure of what appears to be privileged material.  
5 However, it's not in a form that would have been obvious to  
6 someone searching the cells. No one provided the remainder of  
7 the seized material. I only got a subset of it. So I don't  
8 know what it contains. The material has been filed under seal.  
9 Mr. Shih indicates that he read it once without taking notes.  
10 What he would have read, what I read, is not damaging to  
11 Mr. Shafi, or particularly surprising.

12 The information has now been segregated from the  
13 prosecution. The Alameda County Sheriff's Office says that  
14 Mr. Shafi has access to his legal documents and that it will  
15 respect his rights to the attorney-client privilege.

16 The purpose of the visit on December 31st, 2015, by the  
17 criminal justice mental health professionals, the psychiatrist  
18 and licensed clinical social worker, was to do a mental health  
19 assessment. In light of the circumstances and in line with my  
20 concerns, that was an appropriate procedure to undertake, and  
21 there's no record that it was conducted in a manner that's  
22 inconsistent with the professional's duties.

23 In the interest of locating a secure detention facility  
24 that would address Mr. Shafi's conditions of incarceration in a  
25 way that would give him more than one hour, five times a week

1 out of his cell, I asked the Marshal Service to investigate  
2 alternatives to the Glenn Dyer Detention Facility in the  
3 San Francisco Bay Area. I'm told that given the charges  
4 against Mr. Shafi, other neighboring facilities would make the  
5 same classification determination and that the time out of cell  
6 in those facilities is more restrictive than Glenn Dyer.

7 I don't know whether there are other institutions further  
8 away that would have different sorts of conditions of  
9 confinement. I'd be open to hearing about those. But that  
10 would put Mr. Shafi further away from his counsel and his  
11 family, which pose other problems.

12 So for the reasons given at the last hearing, I'm not  
13 inclined to release Mr. Shafi, no matter how stringent the  
14 conditions of that release might be.

15 So with that, Mr. Dratel, is there -- tell me what I've  
16 missed or what's new or different.

17 **MR. DRATEL:** Well, what's new and different is that at  
18 the prior appearance, the Court directed us to confer with the  
19 County and get a sense of what was going to be the future.  
20 Because the Court said it was not tenable for it to remain in  
21 isolation -- to remain in isolation for what could be a very  
22 extensive pretrial period. We now have -- what's new is we  
23 have confirmation of, for one, it's not going to change. And  
24 we also have the County essentially not even acknowledging that  
25 it took materials from the cell that are privileged, that the

1 Court has recognized are privileged.

2 And by the way, they were in a form that were obvious  
3 because they were with other legal materials including some of  
4 the filings in this case. They were all in a folder of similar  
5 materials. So they shouldn't be looking at that. They  
6 shouldn't be turning it over. They have not made any  
7 representation that would give any confidence that's not going  
8 to happen again and again whenever they feel they want to do  
9 it.

10 Another thing that's new is that we know that the reasons  
11 of the classification is really without any basis in fact.  
12 What I mean by that is there is no threat. He was in --  
13 there's no one who could be in a detention center for six  
14 months and everyone not know what their case is about. And he  
15 was not in any danger. And he's not in any danger.

16 And then also the classification is they put the nature of  
17 the charges, too, and that's not permitted. They can't do it  
18 just based on the nature of the charges. That's sentencing him  
19 before the trial. We put in the cases with respect to that.

20 So that's what's new is we have a confirmation of what the  
21 Court said was not tenable, is not going to be tenable for an  
22 extended, extended period of time. And it impairs not just the  
23 mental health, but also the ability to prepare the case because  
24 we can't give him a level of confidence. Based on the County's  
25 response or nonresponse with a number of these issues, we can't

1 give him confidence that he can create confidential material  
2 and not have it seized. And we will get to the impact of the  
3 other seizure in a different context because I do think that  
4 does require additional exploration, but that's not for this  
5 proceeding.

6 But I think that what's new is that we have a confirmation  
7 of the Court's concern that we went back and they've dug their  
8 heels in further. We are without relief other than bail  
9 which -- and I'm not going to reargue all that, but I'm just  
10 saying we have put together a package that I don't think could  
11 be surpassed in trying to --

12 **THE COURT:** We did spend a lot of time --

13 **MR. DRATEL:** I know. I'm not going to spend a lot  
14 of -- I'm just saying, though. And, you know, with respect to  
15 the conversations, we've put in more from those conversations  
16 that we think gives the Court a different perspective on what  
17 those conversations -- someone who's resigned to staying now,  
18 even without all of the rest of it that's coming up, his  
19 parents putting up their house, the community coming in four  
20 times now filling the courtroom. Four times they've adjusted  
21 their schedule, they've come in, they've shown their support.

22 **THE COURT:** It's not the community that I'm concerned  
23 about.

24 **MR. DRATEL:** But, Your Honor, there are sufficient  
25 conditions that -- I mean, there are so many belt and



1 suspenders that we have put together for this.

2 **THE COURT:** I understand, but now you're rearguing.

3 **MR. DRATEL:** Yeah, I know, but also -- but I want  
4 to -- but it has to be juxtaposed against what he's in custody  
5 and what the Court said would not be tenable and it will remain  
6 untenable for the extended period of time. We're looking at 60  
7 days before we get certain materials in this case. And that's  
8 all the phone calls. We've just gotten 11 phone calls. This  
9 is a 24/7/365 wiretap, a FISA wiretap. And we don't know how  
10 long it is, but I can't imagine that it started June 1 when  
11 they already were interviewing him in August of 2014. So it  
12 didn't start on June 1 of 2015.

13 We're going to get a significant volume of calls that we  
14 are going to have to go through. We have already gotten a  
15 significant volume of other materials that we have to go  
16 through. We have to go through it with Mr. Shafi as well.  
17 He's going to have to participate in this, and he's incapable  
18 of doing it under the conditions that exist now.

19 And I think with everything that we've presented, that  
20 we've put a case together that warrants that kind of review.

21 **THE COURT:** Mr. Shih.

22 **MR. SHIH:** Just two points. I think I've submitted a  
23 written brief to the Court that addresses most arguments based  
24 on what the Court has already indicated. I only have two  
25 additional points to add.

1           The first one is based on the volume of calls, there are  
2 several defendants in this district who are -- who have been  
3 segregated in the past where there is a wiretap investigation  
4 in place. And my understanding is there are provisions at the  
5 detention facility that allow counsel to prepare with their  
6 client so that they can access those recordings. So that's the  
7 first point.

8           And then the second point is obviously the prosecution  
9 team doesn't know what's in their legal material -- what is in  
10 Mr. Shafi's legal materials that are at the jail. Based on  
11 what counsel just stated, there are -- it can't be that he has  
12 no confidence, I think, in preparing for this case. I think  
13 that's a little bit of an exaggeration, especially since it  
14 seems like based on what counsel just stated there are other  
15 materials that haven't been seized.

16           My understanding is there were no other -- there were no  
17 other alleged legal materials that were searched by the  
18 detention facility. And certainly the prosecution team and the  
19 FBI has not received anything beyond what has been the subject  
20 of, I think, the December 17th search. So with that, the  
21 government would submit on its written submission.

22           **THE COURT:** Mr. Nefouse, is there anything that you  
23 wanted to add?

24           **MR. NEFOUSE:** If I may, Your Honor.

25           **THE COURT:** Sure.

1           **MR. NEFOUSE:** David Nefouse, Office of the County  
2 Counsel, County of Alameda, on behalf of the Alameda County  
3 Sheriff's Office.

4           First, Your Honor, the County would like to thank the  
5 Court for letting us be here today and let us brief this issue.  
6 I'll try to be brief and address some of the points that  
7 Mr. Dratel brought up in his argument just now.

8           I think first he talked about the mental health concern.  
9 Your Honor, I think that what was stated in the declarations  
10 submitted by Ms. Cairns on behalf of the County noting CJMH,  
11 appointments can be scheduled and there are monthly checkups,  
12 and we're happy to do more to the extent the defendant were to  
13 request it or if the Court has concern.

14           **THE COURT:** Well, so I do have concern, and that is my  
15 major concern. And the reason that I don't think at the moment  
16 there is a changed circumstance because not a lot of time has  
17 passed. But the longer that this lasts before we can get to  
18 trial, the more concern I'm going to have. So that is  
19 something that is of great concern. And it's also a concern to  
20 me that we get this case ready for trial as quickly as we can.

21           **MR. NEFOUSE:** Yes, Your Honor, and we agree. Counsel  
22 for CJMH unfortunately could not be here today, nor could  
23 Ms. Cairns, she's on vacation. But I will be sure to relay  
24 that message to them.

25           The second thing, Your Honor, that Mr. Dratel brought up

1 was this preparation of case and the right to -- you know,  
2 right to counsel. Just a few points on that.

3 First, Your Honor, we checked our records, and since  
4 December the 16th, neither Mr. Dratel nor Mr. Levin have  
5 visited Mr. Shafi at the jail. We just wanted to point that  
6 out to the Court because it seemed that that was an argument  
7 that was being presented that there's no right to counsel when  
8 in fact counsel has not made visits.

9 I do understand that Scott Dudek who is investigator who's  
10 working on behalf of the defense team has made visits.  
11 However, that's not counsel himself.

12 You know, as to Mr. Dudek, I think we pointed this out in  
13 the briefs, he is a prior employee of the Sheriff's Office, but  
14 it's been 23 years since he worked in the jail. So we would  
15 just caution on any reliance on what he represents as to the  
16 conditions and the operation of the jail.

17 Finally, Your Honor, I think that, again, and this is just  
18 consistent with what we said in our briefing, ultimately this  
19 was done for safety. This is a high-profile case. I know that  
20 there was an article last week on NBC Bay Area News  
21 highlighting this case.

22 And the jail population, it changes quite frequently,  
23 Your Honor. And the idea that this is just the same people  
24 over and over again, it's not true. You have people who come  
25 in and out. And we can't account for someone's passions as to

1 this issue, and that's the reason why this was done,  
2 Your Honor.

3 So thank you.

4 **THE COURT:** Mr. Dratel.

5 **MR. DRATEL:** Well, this is part of the problem because  
6 their records, who knows what their records are. I've been  
7 there. I've been there twice. They don't have --

8 **THE COURT:** That wasn't an argument.

9 **MR. DRATEL:** I know, but the point is there's no  
10 accountability and there won't be any accountability and  
11 there's never going to be accountability there. And it's  
12 just -- why should he have confidence when they won't  
13 acknowledge what they did. There's just a complete broad-based  
14 denial. And if it happens again, there will be another  
15 broad-based denial.

16 And I understand the Court's position with respect to the  
17 length of time, but I don't want to get there. I don't want to  
18 get to the point where he's so permanently damaged that he  
19 can't testify and he can't participate. We're trying to do  
20 that now.

21 **THE COURT:** I understand. I understand. But do you  
22 have anything further?

23 **MR. DRATEL:** No, Your Honor.

24 **THE COURT:** All right. So I'm going to deny the  
25 motion to reconsider for the reasons that I stated at the

1 beginning of the hearing. There aren't any new facts or  
2 changes in the law that impact the basis for my earlier  
3 decision. In light of your past, Mr. Shafi's past attempts to  
4 reach Syria, his strongly expressed desire to assist the  
5 Al-Nusra Front, and the disturbing nature of some of his  
6 tape-recorded conversations, I think detention is necessary.

7 I remain interested in Mr. Shafi's conditions of  
8 confinement and mental health, as I am with anybody who's  
9 incarcerated. The Sheriff has a lot of inmates they need to  
10 manage at Glenn Dyer, and nothing has been presented so far  
11 that makes me think that any action on my part is appropriate  
12 or necessary.

13 I encourage Mr. Shafi to utilize the grievance procedure  
14 at Glenn Dyer if issues arise that can't be resolved informally  
15 within the jail. And I encourage County Counsel to be open to  
16 investigating issues raised by and exploring alternatives with  
17 counsel for Mr. Shafi as the need arises.

18 All right. So we have a hearing --

19 **MR. DRATEL:** March 17th.

20 **THE COURT:** -- March 17th on status.

21 **MR. SHIH:** That's correct, Your Honor.

22 **THE COURT:** And so at that time, I'm going to hope  
23 that you can present to me, Mr. Shih, a very detailed sense of  
24 what's been provided, what hasn't been provided, how long it's  
25 going to take for you to be ready so that I can then get some

1 sense from the defense of how quickly we can move this case to  
2 trial. And I am confident this isn't the last time that we're  
3 going to have a conversation about conditions, and so I remain  
4 attentive to that. Okay.

5 **MR. DRATEL:** Thank you, Your Honor.

6 **MR. SHIH:** Thank you, Your Honor.

7 **THE COURT:** All right. Thank you.

8 (Proceedings adjourned at 1:59 p.m.)  
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**CERTIFICATE OF REPORTER**

I, KELLY SHAINLINE, Court Reporter for the United States District Court, Northern District of California, hereby certify that the foregoing proceedings in CR 15-582 WHO, United States of America v. Adam Shafi, were reported by me, a shorthand reporter, and were thereafter transcribed under my direction into text; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

A handwritten signature in cursive script, reading "Kelly Shainline", written over a horizontal line.

Kelly Shainline, Court Reporter

Wednesday, March 9, 2016